ADVANCED DUI SEMINAR

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MOTIONS IN LIMINE

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Be Offensive!!

Using Motions *in Limine* to Improve Your DUI Case

Why File Motions *in Limine?*

- Strengthen Case
  - Increases chance of:
    - admissibility of your evidence
    - excluding inadmissible defense evidence
  - Knowing what evidence can/cannot be used assists with determining trial strategy
  - May be able to nudge defense in direction you want
  - If evidence will not be admitted you may be able to plan an alternative route

Why File Motions *in Limine?*

- May Help Settle Cases Pre-trial
- Allows Potential Appellate Action
- Helps With Trial Notebook

What is a Motion *in Limine*?

"A written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions & statements"

"Purpose of such motion is to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial . . ."

Black's Law Dictionary

AZ Case Law

- In criminal cases, "[a] pretrial motion *in limine* is merely a convenient substitute for evidentiary objections at trial."
- State may object to Defendant's proposed evidence at trial - not required to submit a written motion in advance of trial.

State v. Alvarez, 228 Ariz. 579 (App. 2012).

Preserves Issues for Appeal or Special Action

"[W]here a motion *in limine* is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial"

State v. Leyvas, 221 Ariz. 181 (App. 2009).

But see – State v. Reyes, 238 Ariz. 304, 307 (App. 2015).

Rule 103 - Rulings on Evidence

Subsection (b) - once the court definitively rules on the record, no need to renew objection or offer of proof to preserve the claimed error.

- Be sure the court has definitively ruled

Defense Motions to Suppress in the Guise of Motions *in Limine*

OBJECT! Move to strike

- **Must comply with Rules of Criminal Procedure:**
  - Must be in writing. *Crim. Proc.*, Rule 35.1.
    - Memorandum stating
      - Specific factual grounds
      - Precise legal points, statutes & authorities
  - Must be timely. *Crim. Proc.*, Rule 16.1(b).
    - Filed 20 days prior to trial

***State v. Aguilar,* 171 Ariz. 444 (App. 1992).**

Types of Motions *in Limine*

- Objections to defense evidence
- Requests to admit our evidence

Similar Pre-trial Motions

- Rulings on sufficiency of priors
  - *State v. Colvin,* 2 CA-CR 2012-0099 (1/31/13)
- Pre-trial requests for jury instructions
- Housekeeping matters

Keep book on defense attorneys & judges.

Objecting to Defense Evidence

Rule 702

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
b) the testimony is based on sufficient facts or data;
c) the testimony is the product of reliable principles and methods; and
d) the expert has reliably applied the principles and methods to the facts of the case.

The Defense Has to Meet ALL of These

Example - MICRO CLOTS

Defense Claim

- Microscopic clots in blood sample reduce liquid volume of blood, thereby artificially increasing reported alcohol concentration.

Review ALL 4 Parts of 702

- **Example – Microclots**
  - **The defense experts will not even support it (no studies support it)**
    - The testimony is NOT the product of reliable principles & methods. **Rule 702 (c)**
    - The testimony as not "based on sufficient facts or data" **Rule 702 (b)**
  - **There is no evidence it occurred in this case**
    - It will not "help the trier of fact to understand the evidence or to determine a fact in issue." **Rule 702 (a)(Relevance)**
    - The defense cannot have reliably applied the evidence to the facts of the case. **Rule 702 (d)**
    - **Rule 702 (b)**

Micro Clots

Classic case of extrapolating from valid areas of science.

Hanging Drop

Defense Claim

A drop of blood on the pipette tip contained ethanol & added too much blood to headspace vial

More blood = More ethanol

Hanging Drop

- No evidence it occurred – pure speculation & not relevant [can't meet (a) or (b) or Rule 403]
- No studies support it - so it is not based on reliable principles and methods
- The expert does not reliably apply the principles & methods to the facts
- At best it's a guess

Additional Rule 702 Areas

- **Statistical stacking**
- **Exclude expert's outside their area of expertise**
- **Admitting Test Results w/no expert**
- **Admitting the Actual PBT Result**

Cooperman/Guthrie

And breath test variables

Partition Ratio

Defense Claim

Also called 2100 to 1 or blood to breath ratio

1) Defendant might have an abnormally low partition ratio causing an elevated breath alcohol concentration (BrAC)

2) Defendant may have had a fever that caused an elevated BrAC

- Everyone's temperature rises/changes throughout the day

What did *Cooperman* Hold?

- Partition Ratio Evidence (PRE) is NOT relevant to (A)(2) charge
- PRE may be relevant to (A)(1) impairment charge
- PRE is admissible without evidence of defendant's individual physiology
- Subject to 403 weigh
  - [Should be subject to Rule 702 analysis]
- Either party may invoke the DUI presumptions

State v. Cooperman, 232 Ariz. 347 (2013).

The Easy One

- Partition Ratio Evidence is NOT Admissible for the *Per se* Charges
  - *Cooperman* says so
  - Move to prevent arguments
  - Settle Jury Instructions
    - The jury may not consider the 2100 – 1 partition ratio evidence for the per se charges

Cooperman – What Does it Mean For the (A)(1)?

- Still subject to 403 weigh
- Should be subject to Rule 702 analysis
  - No evidence occurred in this case
  - It will not "help the trier of fact to understand the evidence or to determine a fact in issue." **Rule 702 (a)(Relevance)**
  - The testimony as not "based on sufficient facts or data." **Rule 702 (b)**

Partition Ratio – if admitted

- Remember it benefits the defendant
  - Assuming an average ratio the breath test will be 10% low compared to blood
- Submit limiting jury instruction & make certain it is clear to jury it does not apply to *per se* charges

Not Just Partition Ratio

- These arguments should also apply to:
  - Breathing patterns
  - Breath temperature
  - RFI
  - Etc.

Medical Marijuana

Seeking the Legal High

Prescriptions

Driving on the "High" Ways

But I Only Had Two Drinks

Precluding Self-Serving Hearsay

State v. Barger,

167 Ariz. 563 (App. 1990)

- Defendant's attempts to admit his statements though the arresting officer properly precluded as self-serving hearsay.

Also, State v. Wooten, 193 Ariz. 357 (App. 1998).

Others

Necessity
Facts used just for sympathy
Irrelevant COBRA/blood test evid. from other cases
Batch data from other blood runs
Issues from other places (Scottsdale lab)
Therapeutic range
Intent/strict liability issues (sleep driving, APC, etc.)
Hematocrit, bariatric surgery, high levels of zinc
Officer under investigation

Admitting Our Evidence

PBTs

Admit PBT Refusal

- No Constitutional right to refuse.
- Refusal is not testimonial evidence. So no 5th Amendment issue. *See, State v. Superior Court* (*Ahrens*, RPI), 154 Ariz. 574 (1987).
- A DUI suspect has power, but not right, to refuse to submit to testing. *State ex rel. Verburg v. Jones, (Phipps,* RPI*),* 211 Ariz. 413, ¶ 9, (App. 2005).

Admit PBT Refusal

- It does not matter that the test would not have been admissible
- It is relevant to demonstrate consciousness of guilt
- No legal authority excludes it
- Can admit & comment – just like FST refusals and blood/breath test refusals
- Should even get a jury instruction

Admit PBT for Presence of ETOH – Underage Cases

- Merely use for presence of alcohol
- Only reason PBT results are not admissible is do not meet requirements of 28-1323(A)
  - Foundation to admit "for the purpose of determining a person's alcohol concentration" (statute's language)
  - We aren't doing that

Admit PBT for Presence of ETOH

- Neither statute nor case law suggest foundation needed for mere presence of alcohol
  - Where is the authority to suppress? [Or mistrial?]
- Statutory foundation ensures accuracy of the result – for mere presence we don't care
- It's relevant!
- [Need witness who will testify PBT is capable of detecting the presence of alcohol]

Prevent Defense From Admitting the Actual Number

- They cannot meet requirements of ARS 28-1323(A)
  - Observation period & second sample or 15 min. deprivation with duplicate tests
  - Calibrations
  - Specific instrument may not be DPS approved
- Cannot meet the requirements of Rule 702
  - The actual BrAC is not scientifically reliable without the above

Defense Must Meet the Same Standards of Foundation

- Independent samples
- Second samples
- And PBTs

State ex rel. McDougall v. Johnson (*Foster*, RPI), 181 Ariz. 404 (App. 1994); *Deason.*

A Word About Motions for Mistrial For Mentioning PBT

- What is the LEGAL objection?
- Evaluate what was said:
  - "PBT" or "preliminary breath test?"
  - Did the number come in? [Is there any harm?]
- Only reason PBT results are not admissible is they do not meet requirements of 28-1323(A)
  - Foundation to admit "for the purpose of determining a person's alcohol concentration" (statute's language)
  - The officer did not do that, he just said he gave a PBT
- Mistrials are supposed to be the RARE exception

Keen

Second Sample - *KEEN*

If defendant :

1) requests & obtains a sample for his/her own use &/or
2) attacks validity of State's test

State may:

* cross-examination about receiving second sample, &
* comment on defendant's failure to produce evidence of second sample results at trial (reasonable inference against him/her).

***State ex rel. McDougall v. Corcoran* (*Keen*, RPI), 153 Ariz. 157 (1987).**

If they test and notice an expert file motion for disclosure.

Second Sample – *Keen* allows it

Challenge Defendant & Judge for legal authority that holds we cannot discuss the second sample and argue reasonable inferences

Keen

- Make sure there is enough blood left for testing before making this argument
- Bring that fact out in trial

Remember – Proceed with Caution!

Rogovich

and the missing criminalist

Admitting Tox Results Without the Criminalist Who Conducted the Analysis

Case On Point for Blood Testing

State v. Karp (*Voris,* Real Party in Interest) 236 Ariz. 120 (App. 2014).

What Does *ROGOVICH* Allow?

- An expert to give his/her opinion regarding test results using a nontestifying witness's notes, reports, etc., as a basis for that opinion.
- It's the testifying expert's opinion.
- Not required to prove first expert's qualifications.

Key Concept

The testifying witness will review the notes and reports in order to form and testify to his/her own opinion.

Hearsay is Not a Problem

The testifying expert witness is giving his/her own opinion – it is not hearsay

State v. Lundstrom, 161 Ariz. 141 (1989)

The Data is Not to Prove the Truth of the Matter Asserted

Rogovich, at 42, 932 P.2d at 798.

No Confrontation Clause Violation

The defendant has the right to confront the testifying expert, NOT the non-testifying expert(s) whose findings merely form the basis of the testifying expert's opinion.

Rogovich, at 42, 932 P.2d at 798.

Chain of Custody

Everyone relevant to establishing chain of custody or authenticity of sample does not have to appear - gaps in chain go to weight not admissibility. FN 1 *Melendez-Diaz v. Mass.*, 557 U.S. 305, 129 S.Ct. 2527 (2009).

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163 (2010).

Case Law Is Clear - We Can Do This

- *State v. Karp* (*Voris,* Real Party in Interest) 236 Ariz. 120 (App. 2014).
- *State v. Pesqueira,* 235 Ariz. 470, 333 P.3d 797 (App. 2014).
- *State v. Rogovich,* 188 Ariz. 38, 932 P.2d 794 (1997).
- *State v. Joseph,* 230 Ariz. 296, 283 P.2d 27 (2012).
- *State v. Smith,* 215 Ariz. 221, 229, 159 P.3d 531 (2007).
- *State v. Tucker,* 215 Ariz. 298, 160 Ariz. 177 (2007).
- *State v. Dixon,* 226 Ariz. 545, 250 P.3d 226 (2011).
- *State v. Gomez,* 226 Ariz. 165, 244 P.3d 1163 (2010).

What to do

- Make sure you have disclosed the tox notes, the test results, and the criminalist you plan to call. *State v. Roque*, 213 Ariz. 193 (2006).
- Interview the criminalist you will use
  - Qualifications
  - Familiarity with the testing criminalist
  - The testifying criminalist's opinion
  - Scientific reliability

Testimony

- Qualify testifying expert
- Consider eliciting info regarding testing expert's qualifications
- Lab's safeguards, protocols, & Q/A
- Lay foundation (method, scientific acceptance, how formed own opinion etc. See handout)
- Bring out any connection this witness had to analysis
- *See,* tip sheet

Corpus Delicti

When Most Likely to File Pre-trial?

- When have concerns or believe the defense will object
- When unsure of your judge
- When relying on hearsay

Corpus Delicti Rule

Before a Defendant's Incriminating Statement is Admitted at Trial, the State Must Show:

1) a **reasonable inference** that

2) a crime was committed by **some person**.

State v. Gillies, 135 Ariz. 500, 506 (App. 1983)

DO NOT FOCUS ONLY ON ID

- Must provide a reasonable inference of the entire crime
- Present evidence of impairment/BAC
  - Or get a stipulation

AZ DUI *Corpus* Cases

- ***State ex rel. McDougall v. Superior Court*** **(*Plummer*, RPI),** 188 Ariz. 147 (App. 1996). **(Officer observed impaired driving. Both potential drivers were drunk – sufficient evidence that some person committed crime of DUI.)**

AZ DUI *Corpus* Cases

- Circumstantial & independent evidence corroborated defendant's admissions to drinking & driving.
  - Defendant was found in home near crash scene
  - Visibly intoxicated
  - Nature of crash suggested impaired driving
  - Girlfriend indicated defendant sometimes drives the truck
  - Defendant's property in the truck

State v. Gill, 234 Ariz. 186 (App. 2014).

CORPUS Statute - accidents with an Injury

A.R.S. § 28-1388 (G):

A statement by the defendant that the defendant was driving a vehicle that was involved in an accident resulting in injury to or death of any person is admissible in any criminal proceeding without further proof of *corpus delicti* if it is otherwise admissible.

The Crime Does Not Have to be the Crime in Question

It can be a closely related CHARGED crime.

State v. Morgan, 204 Ariz. 166 (App. 2002);
State v. Sarullo, 219 Ariz. 431 (App. 2008).

RULES OF ENGAGEMENT

On questions of admissibility, the Court "is not bound by the Rules of Evidence, except those with respect to privileges"

Rule 104(a) *Rules of Evid*.

Hearsay is admissible in MOST motion hearings

Harris and *Havens*

Cannot Use the Constitution as a Shield & a Sword

Harris v. New York, 91 S.Ct. 643 (1971)
United States v. Havens, 100 S.Ct. 1912 (1980)
State v. Menard, 135 Ariz. 385 (App. 1983)
State v. Fortier, 149 Vt. 599, 547 A.2d 1327 (1988)

Suppressed Evidence Can Be Used to Impeach.

Others

911 Recordings/Dispatch
Breath Test with Calibrations > 30 Days Apart
Deprivation Period

Thank You!

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Governor's Office of Highway Safety
ARIZONA
Governor Doug Ducey

Rogovich Tip Sheet (using a substitute expert)

NOTE: we WILL NOT admit the testing analyst's written report. We get the reading in orally through the opinion of the testifying expert. The key concept is that the testifying expert must be able to form his/her own opinion regarding the test results from the review of the notes, printouts, etc. He/she will testify to his/her opinion. He/she cannot be a mere conduit for the opinion of the non-testifying analyst.

Be sure to interview your witness to make certain he/she can form his/her own opinion regarding the test results from the review of the notes, printouts, etc. and remind him/her again before he/she testifies that he/she can only testify to his/her own opinion. He/she cannot merely testify that the testing criminalist found __ BAC or __ drugs.

Be sure to disclose the testifying witness, all notes, reports and documents he/she will rely on and his/her opinion. *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

Sample Question Areas – these are not all inclusive, modify as needed

Bring out the testifying criminalist's expertise

- Job description, years of experience
- Education
- Any relevant previous job experience
- General qualifications
- Specific qualifications for conducting the analysis done in this case
- DPS permits
- Keeps up to date with publications in the field
- How many times has he/she conducted this type of analysis?
- Is it part of his/her job responsibilities?
- Does he/she supervise this type of analysis (if applicable)?
- Doe he/she train others to conduct this type of analysis (if applicable)?
- Does he/she confirm these types of analysis in the lab after they are conducted?
- Did he/she confirm this particular analysis (if applicable)? [If not, bring out lab that it is lab protocol for someone else to confirm the analysis and that that happened in this case.]

Sample Question Areas Cont.

You may want to bring out information regarding the qualifications of the criminalist that conducted the analysis but who is not available. (This is not required – the testing criminalist does not have to be either qualified or an expert. *State v. Rogovich*, 188 Ariz. 41, 932 P.2d 794, 797 (1997)).

Examples include:

- The relationship between the missing criminalist and the testifying criminalist (i.e. the testing criminalist was trained by the testifying criminalist, supervised by, worked with, etc.)
- Establish that the testifying criminalist is familiar with the missing criminalist's work/procedures used to test blood/urine samples and is familiar with the fact that the missing criminalist follows proper scientific procedure. (He/she will likely have reviewed the testing criminalists work in the past.)
- The missing criminalist's job description in the crime lab required him/her to conduct these tests on a regular basis
- The missing criminalist's qualifications – if known

During a motion hearing, you may want to bring out the safeguards and protocols of the lab – especially chain of custody protocols. During trial, you certainly will need to. If the testifying expert did either of the reviews of the non-testifying expert's work, be sure to emphasize that point.

Have witness testify to the lab's quality assurance for this type of testing

Lay foundation (examples)

- Show the witness the notes and printouts and ask "what are they?"
- From your review of this exhibit, can you tell what scientific method was used to conduct the analysis in this case?
- What method was used?
- Describe this method.
- Is this method accepted in the relevant scientific community as a valid method of testing (blood or urine) for drugs (or metabolites)?
- Describe what was done in this case.
- How is it that you can form your own opinion regarding these test results?
- Based on your review of the procedure used to analyze the sample, the test results, and records, do you have an opinion as to whether the accepted technique was properly used?
- What is that opinion?
- Based on your review of the procedure used to analyze the sample, the test results, and records, do you have an opinion as to whether the readings are an accurate measurement and recording of the presences of drugs (or metabolite) in the defendant's system?

Sample Question Areas Cont.

- What is that opinion?
- What was found in Defendant's urine (blood) sample?

Note – Some judges may require you to ask the following question, it was not required even under *Deason*.

- Would these test results be accepted in the relevant scientific community as valid test results?

This list is not all inclusive. *See* Toxicologist and Rule 702/*Daubert* scripts for other potential areas of questioning.

Quick Legal References:

General

It is the *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997) line of cases that establishes we can do this. As long as the testifying witness is able to form his/her own opinion and testifies to that opinion, there is no Confrontation Clause issue. *State v. Smith*, 215 Ariz. 221, 229, 159 P.3d 531 (2007); *State v. Tucker*, 215 Ariz. 298, 160 Ariz. 177 (2007); *State v. Dixon*, 226 Ariz. 545, 250 P.3d 226 (2011); *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010); *State v. Joseph*, 230 Ariz. 296, 283 P.3d 27 (2012), and *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014).

Case on point for blood BAC testing: *State v. Karp* (*Voris*, Real Party in Interest) 236 Ariz. 120 (App. 2014).

Even after the US Supreme Court *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004) line of cases, the Arizona Supreme Court has consistently ruled that as long as the testifying expert forms and testifies to his own opinion, there is no Confrontation Clause problem because the defense is free to cross-examine our witness regarding his/her opinion. The most recent pronouncement by the Arizona Supreme Court is *Joseph, supra*. which is post- *Bullcoming v. Mexico*, 131 S.Ct. 2705 (2011). *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 221, 183 L.Ed.2d 89 (2012), is the most recent US Supreme Court opinion. The most recent court of appeals opinions are *Karp, supra.* and *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014)

NOTE: in *Williams v. Illinois*, the US Supreme Court upheld the admission of the testimony. Moreover, in *Crawford*, they specifically stated:

> . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. . .)

Crawford, at 59, 124 S.Ct. 1354, 1369 FN9.

Quick Legal References Cont.

Chain of Custody

The US Supreme Court indicated chain of custody is not an issue in these cases merely because the state does not call the testing criminalist to testify. *See, Melendez-Diaz v. Mass.*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 FN1 (2009)(Everyone relevant to establishing chain of custody or authenticity of sample does not have to appear. Gaps in the chain go to weight not admissibility.) *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010) also indicates chain of custody is not an issue.

State v. Moss, – Depublished!

Occasionally, the defense will erroneously cite to *State v. Moss*, 215 Ariz. 385, 160 P.3d 1143 (App. 2007) for the proposition that allowing one expert to review the analysis performed by another and then form his/her own opinion does violate the Confrontation Clause. This ignores the fact, however, that this opinion was depublished by the Arizona Supreme Court in *State v. Moss*, 217 Ariz. 320, 173 P.3d 1021 (2007).